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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	
Commission's Rules to Facilitate	)	PR Docket No. 93-144
Future Development of SMR Systems	)	RM-8117, RM-8030
in the 800 MHz Frequency Band	)	RM-8029
	)	
Implementation of Sections 3(n)	)	
and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile	)	
Services	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act --	)	PP Docket No. 93-253
Competitive Bidding	)	

**To: The Commission**

**SUPPLEMENT TO  
OPPOSITION OF NEXTEL COMMUNICATIONS, INC.  
TO THE SUPPLEMENT TO PETITIONS FOR RECONSIDERATION OF  
SMALL BUSINESS IN TELECOMMUNICATIONS**

**NEXTEL COMMUNICATIONS, INC.**

Robert S. Foosaner  
Vice President and  
Chief Regulatory Officer

Lawrence R. Krevor  
Director - Government Affairs

Laura L. Holloway  
General Attorney

Nextel Communications, Inc.  
1450 G. Street, N.W.  
Suite 425  
Washington, D.C. 20005  
202-296-8111

Dated: November 14, 1997

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**SUPPLEMENT TO  
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TO THE SUPPLEMENT TO PETITIONS FOR RECONSIDERATION OF  
SMALL BUSINESS IN TELECOMMUNICATIONS**

On November 10, 1997, Nextel Communications, Inc. ("Nextel") filed an Opposition to the Supplement to Petitions For Reconsideration of Small Business in Telecommunications ("SBT"). On November 12, 1997, Nextel received a letter via facsimile from Robert H. Schwaninger, counsel for SBT, "demanding" that Nextel withdraw its Opposition and apologize for having filed it. These actions by Nextel, he indicated, were to be completed no later than 5:00 p.m. on Friday November 14, 1997 if Nextel wished to avoid a variety of unsavory consequences.1/

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1/ Mr. Schwaninger's November 12, 1997 Letter to Robert S. Foosaner is attached hereto. See p. 2 regarding Mr. Schwaninger's demands. Attached to Mr. Schwaninger's letter is a Letter to Daniel B. Phythyon from the Small Business Administration ("SBA"),  
(continued...)

Rather than withdrawing the Opposition, Nextel respectfully submits this Supplement in an effort to provide the Federal Communications Commission ("Commission") with a complete record in this proceeding. Based solely on the claims of his unnamed, but "reliable," "federal agency sources," Schwaninger accuses Nextel of allowing a "factually erroneous petition to remain before the agency."<sup>2/</sup> The fact that Brown and Schwaninger are willing to file untimely pleadings based solely on covert agency "sources" does not require Nextel to withdraw a pleading it filed based solely on overt, written Commission decisions.<sup>3/</sup>

Nextel's Opposition relies on express Commission assertions found in the record of this proceeding. Moreover, Nextel, although a party to this proceeding, is not privy to Brown and Schwaninger's alleged "sources" at either the Commission or the SBA. Nextel cannot be expected to take action in sole reliance on the unsubstantiated allegations of SBT -- particularly when the

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<sup>1/</sup>(...continued)  
dated October 27, 1997, notifying the Commission of the SBA's approval of the small business definitions to be used in the 800 MHz Specialized Mobile Radio auctions.

<sup>2/</sup> November 12, 1997 Letter at p. 2.

<sup>3/</sup> In Mr. Schwaninger's November 12 Letter, he reveals that his October 24, 1997 Supplement was based upon "reliable information from both FCC and SBA personnel." November 12 Letter at p. 1. Pursuant to Section 1.1206 of the Commission's rules, any such ex parte communications between Schwaninger and Commission personnel were required to be disclosed and made part of the record in PR Docket No. 93-144 -- a rulemaking proceeding still subject to judicial review. A review of the docket and the Commission's ex parte public notices evidences that the communications were concealed. See 47 C.F.R. Sections 1.1206(a)(2) and (5).

Commission has issued documentation expressly contradicting SBT's claims.

Additionally, the fact remains that SBT's Supplement was filed out of time, and its lateness is not justified on the facts provided herein. The October 27, 1997 Letter from the SBA does not change the fact that SBT's counsel, knowing that SBA prior approval was required, could have investigated whether that occurred prior to the deadline for petitions for reconsideration.<sup>4/</sup> Despite Brown and Schwaninger's claim that the approval or lack thereof was an issue that "could not reasonably have been known at that time,"<sup>5/</sup> nothing prevented them from seeking this information, and Brown and Schwaninger have not even attempted to demonstrate that it ever made an attempt. As such, apart from the questionable substantive position of SBT in this matter, the procedural tactics

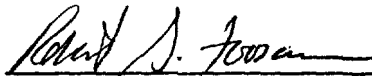
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<sup>4/</sup> The October 27 Letter evidences earlier communications between the staffs of the Commission and the SBA.

<sup>5/</sup> Motion For Leave To File Consolidated Supplement To Petitions For Reconsideration, filed October 24, 1997.

used by Brown and Schwaninger are not supported by the Commission's rules, the Supplement is untimely, and should be dismissed.

Respectfully submitted,



Robert S. Foosaner  
Vice President and  
Chief Regulatory Officer

Lawrence R. Krevor  
Director - Government Affairs

Laura L. Holloway  
General Attorney

Nextel Communications, Inc.  
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Suite 425  
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202-296-8111

Dated: November 14, 1997

**BROWN AND SCHWANINGER**

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November 12, 1997

Sent Via Facsimile Transmission (202) 347-3834

Robert S. Foosaner  
Vice President and Chief Regulatory Officer  
Nextel Communications, Inc.  
1450 G Street, N.W.  
Suite 425  
Washington, D.C. 20005

Re: Opposition Of Nextel Communications, Inc.  
To The Supplement To Petitions For Reconsideration  
Of Small Business in Telecommunications

**Request For Withdrawal**

Dear Mr. Foosaner:

In accord with our telephone conversation of even date in which we informed you that SBT's Supplement to its Petitions For Reconsideration filed in the proceeding before the Federal Communications Commission under PR Docket No. 93-144, GN Docket No. 93-252 and PP Docket No. 93-253, was based on reliable information from both FCC and SBA personnel and, therefore, Nextel's Opposition contained factual errors, the following additional information is provided for your review:

Following herewith is a copy of the interagency letter from the U.S. Small Business Administration to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, granting approval of the size standards contained within the FCC's Orders. Please note that the date of such grant was October 27, 1997. Accordingly, the approval came after the FCC adopted its rules and orders. Also note that the approval was granted after the filing of the SBT Supplement. Accordingly, the claim made by the FCC in its Appendix to the *Second Report and Order* was in error and the basis for the SBT Supplement was factually correct.

In our telephone conversation, we offered Nextel an opportunity to withdraw its Opposition and, on behalf of Nextel, you declined our offer. By this correspondence, we

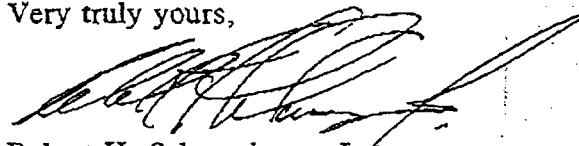
are hereby demanding that Nextel's Opposition be withdrawn. Nextel's failure to act in accord with this demand would result in Nextel's willingness to allow its factually erroneous petition to remain before the agency, thereby breaching its duty to the agency.

Please be advised that we consider the content and tenor of Nextel's Opposition to be scandalous, including the commission of libel as to the integrity of SBT and its counsel. Specifically, Nextel's Opposition alleges that the Supplement "discloses inadequacies on the part of its legal counsel" Opposition at 2, and that "Brown and Schwaninger's Supplement is a fraud" *Id.* We further note Nextel's misinterpretation of SBT's Supplement at Nextel's Opposition at Footnote 7.

Accusing our firm of fraud is taken very seriously by us. As fully demonstrated by the following SBA correspondence, no fraud has been perpetrated by our firm, the Supplement was brought in good faith, and the language contained within the Supplement was specifically intended to focus solely on the agency's procedural obligations to obtain SBA approval prior to the effective date of its Orders. Nextel's characterization to the contrary, the Supplement was prepared in a manner which was intended to recognize the agency's problem in obtaining approval, and was not prepared in a manner which might evidence an intent to embarrass, harass or otherwise cause the agency to be held in disrepute. The same cannot be said about Nextel's statements contained within its Opposition.

To provide to Nextel a fair opportunity to correct its obvious errors, we will defer filing an appropriate Motion before the Commission, however, we will expect that a withdrawal of Nextel's Opposition will be filed on or before 5 P.M. Friday, November 14, 1997, with a copy of such withdrawal delivered to our offices prior to the aforementioned time and date. Additionally, we will expect written apologies from Nextel regarding each accusation contained within the Opposition directed at Brown and Schwaninger and SBT. Those written apologies should be received by our offices no later than 5 P.M. Friday, November 14, 1997. Nextel's failure to comply with these demands will result in SBT and Brown and Schwaninger seeking all remedies available at law and equity.

Very truly yours,



Robert H. Schwaninger, Jr.

RHS:rn



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

October 27, 1997

Daniel B. Phythyon  
Chief, Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W.  
5<sup>th</sup> Floor  
Washington, D.C. 20554

Re: Approval of Small Business Size Standard – Competitive Bidding Rules for  
800 MHz Specialized Mobile Radio Services

Dear Mr. Phythyon:

This letter is in response to your request of May 8, 1997, that the Small Business Administration (SBA) approve small business size standards for use in issuing licenses for various services. Your letter requests approval of size standards for a number of kinds of service licenses. There has been further communication between our agencies, and our respective staffs have also discussed your request in recent meetings. Based upon the information provided SBA, I hereby approve your request with respect to the size standards in connection with licenses for 800 MHz Specialized Mobile Radio (SMR) Services. We will respond in the near future with respect to the size standards for the other kinds of licensed services contained in your May request.

The SBA size standard applicable to SMR services is 1500 employees as established for Standard Industrial Classification code 4812, Radiotelephone Communications. The SBA agrees with the position of the Commission that alternative size standards should be developed for licensing individual SMR services. The SBA's size standard applies to an entire industry, while SMR services is a small segment of the industry possessing different characteristics from the industry as a whole.

The size standards requested by the Commission for the 800 MHz SMR services are \$15 million for a small business and \$3 million for a very small business. These same size standards were approved by the SBA in 1996 for 900 MHz SMR services. Although differences exist between these two SMR services, they are similar in many ways, and the overall costs to build out an awarded license are about equal. SBA agrees with the Commission that the same size standards for these two services are appropriate.

As pointed out in your request, build-out costs for both the 800 MHz and 900 MHz SMR services are significantly less than for narrowband and broadband



personal communications services (PCS). (The SBA approved \$40 million size standards for narrowband in 1995 and for the PCS C Block in 1994.) Build-out costs for both 800 MHz SMR and 900 MHz SMR services remain at a level where small businesses, defined as you have requested, may reasonably be expected to have the capability to finance and construct a viable system.

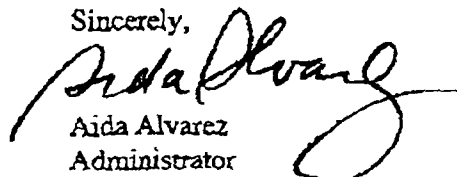
We also base our approval of these size standards on the fact that the proportion of small and very small business bidders relying on these definitions for both the 800 MHz and 900 MHz SMR services auctions appears similar. You advised us that more than 80 percent of the registered bidders for the upcoming 800 MHz SMR auction are small or very small businesses. Similarly, the completed 900 MHz SMR services auction resulted in 78 percent of the bidders and 75 percent of the winning bidders being small or very small businesses. These size standards permitted 25 percent of awarded licenses to go to small or very small businesses.

Finally, we understand the Commission received no comments in response to its proposed rule objecting to the adoption of the \$3 million and \$15 million size standards for the 800 MHz SMR services licenses. This suggests an acceptance of the size standards by those companies expected to participate in the 800 MHz SMR auction.

We note that the Commission's rules on affiliation for 800 MHz SMR size purposes are the same as those we approved for the 900 MHz SMR. The only substantial difference between both of these affiliation rules and the SBA's is the addition of special categories for small and very small business consortiums. A small or very small business consortium is defined by the Commission as a "...conglomerate organization *formed as a joint venture* [emphasis added] between or among mutually-independent business firms, each of which individually satisfies the definition of..." a small or very small business. SBA has recently proposed a rule which would liberalize our affiliation rules and enhance the ability of small business to joint venture together in order to bid on large government procurements. We support the Commission's effort to similarly broaden the opportunities for small businesses to obtain licenses for these SMR services. We note, however, that your rule as written does not clearly exempt consortiums from the affiliation rule pertaining to joint ventures, and suggest you amend your rule appropriately.

We are pleased to assist you in this process, and are happy to work with you and the Commission to assist small businesses. If you have any questions on this matter or need additional information concerning size standards, please contact Gary Jackson, Assistant Administrator for Size Standards, at (202) 205-6618.

Sincerely,



Aida Alvarez  
Administrator

## CERTIFICATE OF SERVICE

I, Ladonya D. Miller, hereby certify that on this 14th day of November, 1997, I caused a copy of Supplement to Opposition of Nextel Communications, Inc. to be served hand delivery or first-class mail, postage prepaid to the following:

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Federal Communications Commission  
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Daniel Phythyon, Acting Chief  
Wireless Telecommunications Bureau  
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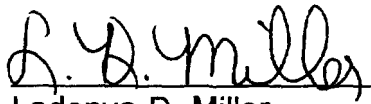
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\* indicates first-class mail, postage prepaid

  
Ladonya D. Miller